

**IN THE SUPERIOR COURT OF THE STATE OF DELAWARE  
IN AND FOR NEW CASTLE COUNTY**

FRED S. SILVERMAN  
JUDGE

NEW CASTLE COUNTY COURTHOUSE  
500 N. KING STREET, SUITE 10400  
WILMINGTON, DELAWARE 19801  
(302) 255-0669

Submitted: October 12, 2006

Decided: February 9, 2007

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Re: *Option One Mortgage Corporation and Wells Fargo  
Bank, N.A. v. Linda Diamicis, C.A. No. 06L-03-024J-FSS*

**Upon Motion to Vacate Sheriff's Sale and Stay Confirmation -- DENIED**

Dear Counsel:

The court is deciding whether to confirm the sheriff's sale, after a mortgage foreclosure on a rental property. The owner/borrower, Linda Diamicis,

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challenges the sale because the winning bidder did not post the full sale price. Diamicis also claims that confirming the sale is unfair because it took place as she was trying to put a forbearance agreement into effect.

### I.

The important facts are undisputed. Diamicis defaulted on her mortgage. She explained that the arrears were an associate's fault, unbeknownst to her. Nevertheless, on March 7, 2006, after the mortgage had been in default for many months, the lender foreclosed. The court entered judgment by default on May 12, 2006. After proper notice, the sheriff put the property up for sale on August 8, 2006, and the property was sold to the high bidder, another investor, Mile High Realty. The price was fair market value.

After the judgment by default was entered and before the sale, Diamicis tried to make arrangements with the bank to keep the mortgage and stop the sale. On August 2, 2006, the bank and Diamicis reached a forbearance agreement, in principle, calling for Diamicis to sign the agreement by August 6, 2006 and pay \$6,880 by August 7, 2006. That was much less than the amount necessary for the loan's reinstatement.

Diamicis did not sign the agreement, nor did she pay by August 7, 2006. Instead, on the morning of the sale, at 9:35 a.m., Diamicis wired \$1,300 to the bank in California. At 9:57 a.m., seven minutes before the scheduled sale, Diamicis wired another \$4,250. The funds, which did not total the agreed upon sum, arrived hours after the sale. In summary, Diamicis's payment was a day late, and many dollars short.

The high bidder, Mile High Realty, posted 10% of the price on the spot, as required. But, aware that Diamicis was trying to keep the property and

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facing the prospect of this litigation, the bidder balked at depositing the balance. The court asked the sheriff whether, as far as the sheriff is concerned, the balk justified the court's setting the sale aside.

## **II.**

The sheriff's position is that the sale was regular until Mile High Realty failed to tender the balance due, on the first Friday after the first Monday of the month following the sale,<sup>1</sup> i.e., September 5, 2006. The sheriff characterizes the bidder's failure to tender the balance as "an irregularity in the proceedings." Further, the sheriff is concerned, as a policy matter, that all parties submit the required funds on time.

The sheriff, however, is also concerned that an inflexible deposit deadline "would result in a significant increase in motion practice." That would add to the bidders' and the sheriff's costs. In summary, calling this case "unique and unusual," the sheriff believes that although the bidder's failure to submit the balance when due was an irregularity, "it has not caused any prejudice to [Diamicis]." Therefore, the sheriff favors this sale's confirmation.

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<sup>1</sup> Super. Ct. Crim. R. 69(d).

### III.

Citing Judge Woolley,<sup>2</sup> *Burge v. Fidelity Bond and Mortgage Co.* holds that the decision whether to confirm or set aside sheriff's sales is addressed to the court's broad discretion.<sup>3</sup> While the court's discretion is broad, it is not unlimited.<sup>4</sup> "For instance, a court may not arbitrarily or capriciously refuse to confirm a sale, where there are no irregularities in the proceeding. . . ."<sup>5</sup> Where there was an irregularity in the proceeding, an affected party may invoke the

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<sup>2</sup> Victor B. Woolley, *Practice in Civil Actions in Delaware* §1108 (2d ed. 1906) ("Where there has been mistake, misconduct or fraud in the course of the sale whereby any of the parties to or interested in the proceeding are prejudiced, it may be corrected by an application on the part of the party aggrieved to set the sale aside. The power of the court in this respect is broad and discretionary."). *See also* §1109 ("When a party is injured by reason of fraud mistake, misconduct or irregularity in the conduct of a sheriff's sale, . . . he may seek his redress by an application to the court to set the sale aside.") and §1116 ("Generally speaking, any irregularity in the conduct of a sale whereby prejudice is done to the parties having rights and interests in the sale constitutes a sufficient reason to be embodied in an application for a rule to show cause why a sheriff's sale should not be set aside.").

<sup>3</sup> 648 A.2d 414, 419-20 (Del. 1994). *See also Soliman v. Spencer*, 115 Bankr. 471, 482 (D. Del. 1990).

<sup>4</sup> *Id.* at 420.

<sup>5</sup> *Id.* at 420. *See also Greenpoint Mortgage Funding, Inc. v. McCabe*, Del. Super., C.A. No. 03L-03-011, Bradley, J. (Nov. 27, 2006) (Letter Op.).

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court's discretion to set a sheriff's sale aside. What informs the court's discretion is whether the party challenging the sale was prejudiced by the irregularity.<sup>6</sup>

The court accepts the sheriff's conclusion that Mile High Realty's failure to deposit the full sale price is an irregularity. Therefore, the court's discretion to confirm or set aside the sale has been properly invoked by Diamicis. Nevertheless, the court also agrees with the sheriff that the irregularity in the sale is not prejudicial to Diamicis.

While the irregularity was potentially significant to the sheriff or the judgment creditor, and it might have made a difference to another bidder, Mile High Realty's balk had no significance to Diamicis or the judgment creditor. Further, as presented, the sheriff supports the sale, and no other bidder has tendered the full deposit. Therefore, the irregularity in the sale caused no prejudice to Diamicis.

#### IV.

The court's power to set aside a sheriff's sale has been characterized as equitable.<sup>7</sup> Diamicis, therefore, argues that the sale should be set aside because the sheriff's exposing the property to sale was unfair to her. To establish that, she asks the court to balance the equities. Although Diamicis did not support her

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<sup>6</sup> *Id.*

<sup>7</sup> *Id.* at 420 (citing and quoting *Petition of Seaford Hardware Co.*, 132 A. 737, 738 (Del. Super. 1926) ("This equitable power derives from the inherent control of the court over its own process 'for the correction of abuses or prevention of injury.'")).

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initial filing with the usual affidavit,<sup>8</sup> the court will recapitulate her counsel's proffer.

Diamicis defaulted because her partner stole the money she needed to make the mortgage payments, and she had no legal defense to the foreclosure. Although the property is a rental now, it was owned by her family for more than 25 years. It only became a rental property after her mother moved to a nursing home last year. Diamicis claims that "she did make the total amount of reinstatement payments prior to the sale of the property." (That claim is rejected, above.) Moreover, Diamicis observes that Mile High Realty "is in the business of buying properties from sheriff's sales."

Diamicis concedes, however, that the sale price represented fair market value. Her last-minute payments did not even make the mortgage current, much less pay it off. Getting her to try to make the mortgage current took a sheriff's sale, and Diamicis offers no convincing reason to believe that she can pay off the mortgage or keep it current.

The court assumes without deciding that it is appropriate to weigh the equities, even though Diamicis was not prejudiced by the irregularity in the sale. But assuming that even a non-prejudicial irregularity triggers a balancing process, fairness does not dictate that the court should set the sale aside. As presented above, the property has sentimental value, but it is not Diamicis's home. It is an

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<sup>8</sup> Woolley §1111 ("The application to set aside a sheriff's sale is made upon the affidavit and motion of the party excepting to the sale, containing all the reasons or grounds constituting the objections."). *See also City of Wilmington v. Rochester*, Del. Super., C.A. No. 01T-10-023, Silverman, J. (July 16, 2002) (Op. and Order).

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investment. She let the mortgage fall seriously into arrears. She allowed a judgment by default, and she waited until almost literally the last minute to address the arrears. Then, she only made partial payments on the arrears. Finally, the bank has no assurance that if the sale were set aside, the bank would not have to undertake another costly foreclosure proceeding.

**V.**

For the foregoing reasons, Defendant's Motion to Vacate Sheriff's Sale and Stay Confirmation is **DENIED**.

**IT IS SO ORDERED.**

Very truly yours,

/s/ Judge Fred S. Silverman

FSS/lah  
oc: Prothonotary (Civil Judgments Division)  
pc: Donald Gouge, Esquire